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FORUMLESS: WHY VICTIMS OF THE UYGHUR CRISIS SHOULD BE ABLE TO VINDICATE THEIR CLAIMS IN FEDERAL COURT

*by: Chase Archer**

Abstract

U.S. courts can serve as forums for victims of international human rights abuses to litigate claims against foreign defendants. Oftentimes, U.S. courts are the only option for foreign litigants who are unable to seek remedies in their own countries or in international courts. This Comment discusses the difficulties a victim of the Uyghur crisis would face attempting to use U.S. courts to litigate claims against the Chinese government or government officials under existing law. The purpose of this Comment is not to address any potential challenge to a claim but rather to address the claim preclusions common to foreign plaintiffs seeking to litigate international human rights claims in U.S. courts. In light of recent Supreme Court decisions limiting the ability of foreign plaintiffs to do so, this Comment argues that Congress should pass legislation authorizing Uyghur victims to use U.S. courts as forums for claims against perpetrators within the Chinese government.

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I. INTRODUCTION

In March 2018, Tursunay Ziawudun was told to report to a local police station near her home.[1] Once she arrived there, Chinese government officials told her she would be transported to a facility for "more education."[2] Instead, she was taken to an internment camp, where she was subjected to food deprivation, severe beatings, rape, and indoctrination for a period of several months.[3] Ziawudun is one of over one million Uyghurs taken from their homes and forced into camps as part of the Chinese government's systematic campaign against the Uyghur people, an ethnic and religious minority located in the northwest province of Xinjiang, China.[4] This Comment argues that victims of the Uyghur crisis ("Uyghur litigants") should be able to use U.S. courts as forums to litigate claims against the Chinese government or government officials responsible for these heinous acts.

The United States has a significant interest in allowing non-citizen litigants to use U.S. courts to litigate human rights abuse claims. Victims of human rights abuses are often left with no recourse within their own jurisdictions to seek relief or recognition of harm. The United States has a moral duty to allow victims to access federal courts to seek justice that is not available anywhere else. Beyond moral responsibility, allowing non-citizens to litigate human rights claims is also in the strategic interest of the United States. In cases where the U.S. government recognizes human rights abuses through legislation or executive action, threat of lawsuit in the United States is yet another tool by which the U.S. government can attempt to disincentivize such abuses.

This Comment first describes the Chinese government's campaign of terror in Xinjiang. Next, it discusses how Uyghur litigants might bring claims in federal court[5] under existing law, including the Alien Tort Statute ("ATS") and the Torture Victim Protection Act

1. Matthew Hill et al., *'Their Goal Is to Destroy Everyone': Uighur Camp Detainees Allege Systematic Rape*, BBC NEWS (Feb. 2, 2021), https://www.bbc.com/news/world-asia-china-55794071 [https://perma.cc/F78E-U9GF].

2. *Id.*

3. *Id.*

4. *Id.*

5. This Comment does not analyze how foreign litigants might bring claims against international human rights abusers in state court. For state court analysis, see generally Paul Hoffman & Beth Stephens, *International Human Rights Cases Under State Law and in State Courts*, 3 U.C. IRVINE L. REV. 9 (2013).

("TVPA"). This Comment concludes that it is unlikely a Uyghur litigant could successfully bring a claim against the Chinese government or officials responsible for the atrocities committed in Xinjiang. The Comment argues that because current restrictions on both the ATS and the TVPA limit the ability of foreign plaintiffs to sue human rights abusers for actions that do not take place on U.S. soil, Congress should pass legislation clarifying the ability of Uyghur litigants to use U.S. courts as forums to seek redress against the Chinese government or government officials.

II. The Situation in Xinjiang

The Xinjiang Uyghur Autonomous Region ("Xinjiang") is a province in northwest China that is home to the Uyghur people.[6] The Uyghurs are a religious, cultural, and ethnic minority group native to Xinjiang.[7] While Xinjiang is officially an autonomous region where the Uyghurs are entitled to some self-governance, the reality is centralized control by the Chinese government.[8] Beijing's interest in retaining control of Xinjiang is multifaceted and not discussed in depth in this Comment, though those interests include Xinjiang's history of attempted insurrection against centralized control and its treasure trove of strategic resources including coal and oil.[9]

The U.S. government has recognized that China is engaging in a campaign of genocide[10] against the Uyghur people that is calculated to cement control over the region and eradicate Uyghur culture.[11] Beijing sees Uyghur culture as a threat to the proliferation of Han-Chinese culture, which it hopes will replace Uyghur culture and, in so doing, increase government control, force assimilation, and ultimately quash dissent.[12]

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6. Connor W. Dooley, Note, *Silencing Xinjiang: The Chinese Government's Campaign Against the Uyghurs*, 48 Ga. J. Int'l & Compar. L. 233, 235 (2019).

7. *Id.*

8. *See id.* at 241.

9. Brennan Davis, Comment, *Being Uighur . . . with "Chinese Characteristics": Analyzing China's Legal Crusade Against Uighur Identity*, 44 Am. Indian L. Rev. 81, 89–91 (2019).

10. Press Release, Michael R. Pompeo, U.S. Sec'y of State, U.S. Dep't of State, Determination of the Secretary of State on Atrocities in Xinjiang (Jan. 19, 2021), https://2017-2021.state.gov/determination-of-the-secretary-of-state-on-atrocities-in-xinjiang/index.html [https://perma.cc/YPL8-AAS6]. This Comment does not analyze whether the Chinese government is engaging in genocide because it is irrelevant to claims under the ATS or the TVPA. For an analysis of whether the Chinese government's actions in Xinjiang meet the legal standard for genocide, see generally *The Uyghur Genocide: An Examination of China's Breaches of the 1948 Genocide Convention*, Newlines Inst. for Strategy & Pol'y (Mar. 8, 2021) [hereinafter Uyghyr Genocide Report], https://newlinesinstitute.org/uyghurs/the-uyghur-genocide-an-examination-of-chinas-breaches-of-the-1948-genocide-convention/ [https://perma.cc/UK97-PG6H].

11. *See* Dooley, *supra* note 6, at 235.

12. *See id.*

The Xi regime is using draconian measures to achieve those goals, namely cutting birth rates among Uyghurs through forced abortions, forced use of intrauterine devices, and forced sterilizations.[13] The government is also using omnipresent surveillance to identify and punish dissenters.[14] The surveillance is used to find Uyghurs and place them in concentration camps where they are subjected to forced labor and torture.[15] The camps are also part of a reeducation effort to indoctrinate Uyghur people with the Xi regime's political ideology.[16] The Chinese government has also destroyed Muslim religious sites in the area, called practice of the faith a "sign of extremism," and banned the use of the Uyghur language in favor of Mandarin.[17]

However, the situation in Xinjiang reaches far beyond the borders of China. Reports show Uyghurs who are working in forced labor camps are manufacturing products shipped and sold in the United States.[18] Companies including Coca-Cola, Nike, and Apple lobbied against a bill that would ban imported goods from the region because they were made through forced labor.[19] While lobbying against the bill is not an admission that those companies would suffer financially if the bill was passed, there is significant evidence the companies benefit from the use of forced labor to create their goods. There are over 80 multinational companies[20] in the United States that use, either di-

13. *China Cuts Uighur Births with IUDs, Abortion, Sterilization*, ASSOCIATED PRESS (June 28, 2020), https://apnews.com/article/ap-top-news-international-news-weekend-reads-china-health-269b3de1af34e17c1941a514f78d764c [https://perma.cc/7V86WFKQ].

14. *See* Dooley, *supra* note 6, at 235, 245–47.

15. *See id.*; VICKY XIUZHONG XU ET AL., AUSTRALIAN STRATEGIC POL'Y INST., UYGHURS FOR SALE 5 (Mar. 1, 2020), https://www.aspi.org.au/report/uyghurs-sale [https://perma.cc/EL8N-QDQV]; Ayse Wieting, *Uyghur Exiles Describe Forced Abortions, Torture in Xinjiang*, ASSOCIATED PRESS (June 3, 2021), https://apnews.com/article/only-on-ap-middle-east-europe-government-and-politics-76acafd6547fb7cc9ef03c0dd0156eab [https://perma.cc/VG3D-B9TE].

16. Dooley, *supra* note 6, at 235.

17. Yasmeen Serhan, *Saving Uighur Culture from Genocide*, ATLANTIC (Oct. 4, 2020), https://www.theatlantic.com/international/archive/2020/10/chinas-war-on-Uighur-culture/616513/ [https://perma.cc/K266-2MCV].

18. Alison Killing & Megha Rajagopalan, *The Factories in the Camps*, BUZZFEED, https://www.buzzfeednews.com/article/alison_killing/xinjiang-camps-china-factories-forced-labor (Jan. 4, 2021, 4:26 PM) [https://perma.cc/M97J-WMGD]; Ana Swanson, *Nike and Coca-Cola Lobby Against Xinjiang Forced Labor Bill*, N.Y. TIMES, https://www.nytimes.com/2020/11/29/business/economy/nike-coca-cola-xinjiang-forced-labor-bill.html (Jan. 20, 2021) [https://perma.cc/EKL3-BNXY].

19. Swanson, *supra* note 18.

20. The 82 multinational corporations that the Australian Strategic Policy Institute identifies as benefiting from forced labor in Xinjiang are as follows:

> Abercrombie & Fitch, Acer, Adidas, Alstom, Amazon, Apple, ASUS, BAIC Motor, Bestway, BMW, BMW, Bombardier, Bosch, BYD, Calvin Klein, Candy, Carter's, Cerruti 1881, Changan Automobile, Cisco, CRRC, Dell, Electrolux, Fila, Founder Group, GAC Group (automobiles), Gap, Geely Auto, General Motors, Google, Goertek, H&M, Haier, Hart Schaffner Marx, Hisense, Hitachi, HP, HTC, Huawei, iFlyTek, Jack & Jones, Jaguar,

rectly or indirectly, forced labor in Xinjiang for their goods.[21] These are major corporations with significant markets in the United States.[22] Forced labor is so widespread in Xinjiang that no corporation manufacturing goods there can conclude their supply chain does not benefit from forced labor,[23] and no consumer can be guaranteed their goods are not tainted.

III. How a Uyghur Litigant Could Use U.S. Courts as Forums for Claims Against the Chinese Government or Government Officials

A. *The Alien Tort Statute*

The ATS grants federal district courts jurisdiction over claims where a foreign citizen sues for a violation of the law of nations.[24] The ATS itself is not a cause of action; it allows federal courts to consider causes of actions that foreign litigants bring under the laws of nations.[25] This Section discusses the origin of the ATS as a vehicle for international human rights claims, describes how federal courts currently apply the ATS, and analyzes how a Uyghur plaintiff could bring a claim under the ATS.

1. Origin of the ATS as a Vehicle for International Human Rights Claims

Enacted by the First Congress in 1787, the ATS provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the laws of nations or a treaty of the United States."[26] Claims were almost never brought under the ATS for the first 200 years of its existence, until the landmark *Filártiga v. Peña-Irala* decision opened the floodgates to victims of human rights abuses to bring cases in federal court.[27] *Filártiga* was the first modern case brought under the ATS that allowed a non-U.S. citizen to use the jurisdictional statute to bring a claim against a

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Japan Display Inc., L.L.Bean, Lacoste, Land Rover, Lenovo, LG, Li-Ning, Mayor, Meizu, Mercedes-Benz, MG, Microsoft, Mitsubishi, Mitsumi, Nike, Nintendo, Nokia, Oculus, Oppo, Panasonic, Polo Ralph Lauren, Puma, SAIC Motor, Samsung, SGMW, Sharp, Siemens, Skechers, Sony, TDK, Tommy Hilfiger, Toshiba, Tsinghua Tongfang, Uniqlo, Victoria's Secret, Vivo, Volkswagen, Xiaomi, Zara, Zegna, and ZTE.

XU ET AL., *supra* note 15, at 5.

21. *Id.*

22. *Id.*

23. *See id.* at 28.

24. 28 U.S.C. § 1350.

25. Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 525 (4th Cir. 2014).

26. Filártiga v. Peña-Irala, 630 F.2d 876, 880 (2d Cir. 1980).

27. Ranon Altman, Note, *Extraterritorial Application of the Alien Tort Statute After Kiobel*, 24 U. MIAMI BUS. L. REV. 111, 115–16 (2015).

foreign actor for a violation of international law.[28] In *Filártiga*, the Second Circuit held that U.S. courts could be used to adjudicate tort claims arising outside of its territorial jurisdiction.[29] In doing so, the court noted the "common danger" posed by the flagrant disregard of basic human rights and noted that allowing U.S. courts jurisdiction over such violations is an important step towards "free[ing] all people from brutal violence."[30]

2. How the ATS Is Currently Applied in Federal Court

Since the "small step" taken by the Second Circuit in *Filártiga*, U.S. courts have taken several steps backwards, restricting the ability of foreign litigants to use the ATS to bring extraterritorial claims against international human rights abusers. The Supreme Court first restricted the use of the ATS in *Sosa v. Alvarez-Machain*.[31] There, the Court held that Congress did not intend the ATS to be a jurisdictional grant allowing for all claims under the law of nations to be inducted to the common law.[32] Instead, the Court found that the First Congress intended the ATS to have immediate effect, providing a cause of action for a limited number of international law violations.[33] Ultimately, the Court held that the ATS did allow for a narrow class of claims under the law of nations.[34] Such claims must be narrow, rest on a norm "accepted by the civilized world," and have specificity comparable to the original causes of action the First Congress likely intended to recognize.[35]

The Supreme Court further restricted the use of the ATS by foreign human rights litigants with its holding in *Kiobel v. Royal Dutch Petroleum Co.*[36] There, the Court held the presumption against extraterritoriality applied to the ATS.[37] The presumption against extraterritoriality is a canon of statutory construction that states that "when a statute gives no clear indication of an extraterritorial application, it has none,"[38] reflecting that "United States law governs domestically but does not rule the world."[39] The canon is usually applied to acts of Congress that regulate conduct; however, as a jurisdictional statute, the ATS does not regulate conduct but allows federal courts

28. *See id.*
29. *Filártiga*, 630 F.2d at 885.
30. *Id.* at 890.
31. Sosa v. Alvarez-Machain, 542 U.S. 692, 724–25 (2004).
32. *Id.* at 724.
33. *Id.*
34. *Id.* at 725.
35. *Id.*
36. Kiobel v. Royal Dutch Petrol. Co., 569 U.S. 108, 117 (2013).
37. *Id.*
38. *Id.* at 115 (quoting Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010)).
39. *Id.* (quoting Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 454 (2007)).

to recognize causes of action well established in international law.[40] The *Kiobel* Court went further than it did in *Sosa*, noting that concerns over judicial interference in the conduct of foreign policy is not sufficiently addressed by limiting causes of action under the ATS to those that are "specific, universal, and obligatory."[41] A claim under the ATS can overcome the presumption against extraterritoriality upon consideration of two factors: first, whether the conduct took place outside of the United States; and second, whether the claim "touch[es] and concern[s] the territory of the United States . . . with sufficient force to displace the presumption."[42]

Courts differ on how the factors should be weighed.[43] The Second Circuit maintained that if all relevant conduct took place abroad, the presumption against extraterritoriality precludes the claim regardless of how strongly the claim might touch and concern the United States.[44] On the other hand, the Fourth Circuit held that even if none of the relevant conduct takes place in the United States, the presumption can still be displaced if "'the parties' identities and their relationship to the causes of action[ ]' touch and concern the United States with enough force to displace the presumption against extraterritoriality."[45] Thus, the meaning of "touch and concern" becomes the touchstone for the ability of foreign litigants to bring suits for human rights abuses.

In *Kiobel*, the Court did not define "touch and concern" but did conduct an analysis of the defendant's conduct and its relationship to U.S. territory.[46] Other courts, including the Fourth Circuit, interpret the touch and concern test to require a "fact-based analysis to determine whether particular ATS claims displace the presumption of extraterritorial application."[47] In *Al Shimari v. CACI Premier Technology, Inc.*, the Fourth Circuit held the plaintiff's claims did displace the presumption because of its "substantial" ties to U.S. territory.[48]

And while the *Kiobel* court did not define "touch and concern," it did define *what* must touch and concern the territory of the United States—the claim itself.[49] A claim is the "aggregate of operative facts giving rise to a right enforceable by a court."[50] Importantly, it is the

40. *Id.* at 116.
41. *Id.* at 117 (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004)).
42. *Id.* at 124–25.
43. *See* Altman, *supra* note 27, at 115–16.
44. *Id.* at 127.
45. *Id.* (quoting Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 527 (4th Cir. 2014)).
46. *See Kiobel*, 569 U.S. at 124–25.
47. Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 527 (4th Cir. 2014).
48. *Id.* at 528, 530–31.
49. Altman, *supra* note 27, at 128.
50. *Id.* at 128–29.

aggregate of facts, not the conduct of the defendant, that must touch and concern the territory of the United States with sufficient force to displace the presumption against extraterritoriality.[51]

3. How a Uyghur Litigant Could Bring a Claim Under the ATS

A Uyghur litigant who suffered brutality at the hands of the Xi regime likely could use the ATS to establish that a federal court has jurisdiction to hear the claim. Such a claim would need to establish, among other things, a violation of the law of nations, overcome the presumption against extraterritoriality, and account for other potential claim preclusions.[52]

a. A Violation of the Law of Nations

The ATS grants subject matter jurisdiction to federal courts to consider non-U.S. citizens' law of nations violation claims.[53] Thus, a Uyghur litigant would need to allege a violation of the law of nations to bring a claim under the ATS. U.S. courts recognize as violations of the law of nations systematic acts of torture because of the "universal condemnation of torture in international agreements[ ] and the renunciation of torture as an instrument of official policy by virtually all the nations of the world."[54] While not discussed in depth in this Comment, the systematic and severe campaign of torture, forced abortion, sterilization, and forced labor against the Uyghur people, at the hands of Chinese government officials, is well documented.[55] These horrific acts perpetrated by the Chinese government are clear violations of the law of nations.[56]

The United States has recognized Chinese government actions in Xinjiang that amount to violations of the law of nations.[57] Congress officially recognized the Chinese government violated the law of nations in the Uyghur Human Rights Policy Act of 2020.[58] The executive branch has made several similar determinations, including a recognition that the Chinese government is engaged in "the arbitrary imprisonment or other severe deprivation of physical liberty of more than one million civilians, forced sterilization, torture of a large number of

51. *Id.* at 129.

52. This Comment only addresses those issues common to foreign litigants bringing extraterritorial human rights abuse claims rather than all the elements of a successful claim.

53. 28 U.S.C. § 1350.

54. Filártiga v. Peña-Irala, 630 F.2d 876, 880 (2d Cir. 1980).

55. Press Release, Pompeo, *supra* note 10; John Sudworth, *China Uighurs: A Model's Video Gives a Rare Glimpse Inside Internment*, BBC NEWS (Aug. 4, 2020), https://www.bbc.com/news/world-asia-china-53650246 [https://perma.cc/H5HM-2ZWC]; Hill et al., *supra* note 1; UYGHYR GENOCIDE REPORT, *supra* note 10.

56. *See Filártiga*, 630 F.2d at 880.

57. Uyghur Human Rights Policy Act of 2020, Pub. L. No. 116-145, 134 Stat. 648; Press Release, Pompeo, *supra* note 10.

58. Uyghur Human Rights Policy Act § 3.

those arbitrarily detained, forced labor, and the imposition of draconian restrictions on freedom of religion or belief, freedom of expression, and freedom of movement."[59] Any of these actions constitute a violation of the law of nations and, in the aggregate, serve as even stronger evidence of a violation. Any Uyghur litigant who suffered any of these acts could show Chinese government officials violated the law of nations, thus establishing a cause of action.

b. Overcoming the Presumption Against Extraterritoriality

Claims brought under the ATS are subject to the presumption against extraterritoriality.[60] The presumption against extraterritoriality is a doctrine of statutory interpretation that presumes statutes are not applicable on foreign soil unless Congress clearly intended otherwise.[61] Thus, a claim cannot be brought under the ATS unless it overcomes that presumption.[62] When determining if a claim can overcome the presumption, courts consider whether the tortious conduct took place in the United States and whether the claim touches and concerns the United States with sufficient force to displace the presumption against extraterritoriality.[63]

The first factor of the test will not weigh in a Uyghur litigant's favor. The Chinese government is conducting its campaign of torture, forced abortion, sterilization, and forced labor in Xinjiang, not in the United States.[64] Thus, the plaintiff's ability to overcome the presumption will rest on her ability to show the claim touches and concerns the United States with sufficient force. It likely does so.

A Uyghur litigant's claim does touch and concern U.S. territory with sufficient force to overcome the presumption against territoriality for two reasons. First, Congress and the President, through enacted law, have already stated the United States has a significant interest in the plight of Uyghurs.[65] The Uyghur Human Rights Policy Act of 2020 "direct[s] United States resources to address human rights violations and abuses, including gross violations of human rights, by the Government of the People's Republic of China through the mass surveillance and internment of over 1,000,000 Uyghurs."[66] The Act imposed further sanctions on Chinese officials identified as responsible for the torture of Uyghurs, including asset forfeiture and visa revocation.[67]

59. Press Release, Pompeo, *supra* note 10.
60. Kiobel v. Royal Dutch Petrol. Co., 569 U.S. 108, 117 (2013).
61. James Janison, Comment, *Justifying the Presumption Against Extraterritoriality: Congress as a Foreign Affairs Actor*, 53 N.Y.U. J. INT'L L. & POL. 1, 1 (2020).
62. *See id.* at 4–5.
63. *Id.* at 2; *Kiobel*, 569 U.S. at 124–25.
64. Press Release, Pompeo, *supra* note 10; Sudworth, *supra* note 55; Hill et al., *supra* note 1; UYGHYR GENOCIDE REPORT, *supra* note 10.
65. Uyghur Human Rights Policy Act of 2020, Pub. L. No. 116-145, 134 Stat. 648.
66. *Id.*
67. *Id.* at 652.

The enactment of the Act is a definite statement by the President and Congress that the plight of Uyghurs is of grave concern to not only the interests of the United States but also its territory. Congress, by revoking visas from Chinese government officials responsible for the torture of Uyghurs, invokes a territorial interest of the United States in prohibiting the perpetrators from freely accessing U.S. territory. Thus, a Uyghur litigant's claims of torture and forced labor would sufficiently touch and concern the territory of the United States because of the interest identified in the Uyghur Human Rights Policy Act. While Congress's word alone should demonstrate a Uyghur litigant's claims overcome the "touch and concern" test articulated in *Kiobel*, there is additional support.

Forced labor in Xinjiang camps is used to manufacture goods that are sold in the United States to U.S. consumers.[68] A Uyghur litigant likely could overcome the presumption against extraterritoriality because of those manufacturing connections to U.S. territory and markets. The litigant could argue that the gross human rights abuses by the Chinese government, including forced labor, touch and concern the United States because of the likelihood that forced Uyghur labor is used to manufacture and sell products and goods to the United States.[69] China's use of forced labor creates a touch and concern both to the national interest (opposition to slavery and forced labor) and to the physical territory of the United States, as these tainted products are shipped and sold in the United States.[70] While it is impossible to guarantee every manufactured product is ethically sourced, a Uyghur litigant could argue the situation here is unique, as it is the Chinese government *itself* rather than a negligent corporation that is forcing the labor. These actions are essentially state-sponsored slavery.

The U.S. government has recognized this concern.[71] In a 2020 order, the Department of Homeland Security (the "Department") withheld release of a number of products and goods manufactured in Xinjiang because they were made with illegal state-sponsored forced labor.[72] The Department prevented release of any product made in the Lop County No. 4 Vocational Skills Education and Training Center in the Xinjiang Uyghur Autonomous Region because Customs and Border Protection determined forced labor conditions were present, including "coercive/unfree recruitment, work and life under duress, and restriction of movement."[73] The Department also blocked imports from four

68. XU ET AL., *supra* note 15, at 5.
69. *See id.*
70. *Id.*
71. *DHS Cracks Down on Goods Produced by China's State-Sponsored Forced Labor*, U.S. DEP'T OF HOMELAND SEC. (Sept. 14, 2020), https://www.dhs.gov/news/2020/09/14/dhs-cracks-down-goods-produced-china-s-state-sponsored-forced-labor [https://perma.cc/M6WV-LH72].
72. *Id.*
73. *Id.*

other factories in Xinjiang that manufacture products ranging from apparel and cotton to computer parts.[74] The Department noted that allowing goods created under such conditions into the U.S. supply chain "undermines the integrity of [U.S.] imports."[75] Thus, the executive branch clearly articulated how the Chinese government's state-sponsored forced labor camps touch and concern the *physical* territory of the United States: They poison the integrity of goods inside the United States. The Department concluded that "American consumers deserve and demand better."[76]

Additionally, Congress is currently considering the Uyghur Forced Labor Prevention Act, legislation that would "regard the prevention of [atrocities like those in Xinjiang] as in its national interest."[77] The bill, which passed the House of Representatives,[78] explicitly recognizes the prevention of the Uyghur crisis as in the national interest of the United States and further authorizes the prohibition of imported goods manufactured using forced labor.[79] This legislation, in conjunction with existing action taken by the Department, demonstrates a clear "touch and concern" to U.S. territory sufficient to satisfy the presumption against extraterritoriality.

c. Other Preclusions to the ATS

In addition to the presumption against extraterritoriality, there are two other potential claim preclusions foreign human rights litigants often face: the Foreign Sovereign Immunities Act ("FSIA") and the doctrine of forum non conveniens.

If a Uyghur litigant sought to bring a claim against the Chinese government itself, they would need to establish an exception to the FSIA.[80] The FSIA established that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States."[81] While there are several exceptions to the FSIA, only the commerciality exception, known as the direct-effect exception,[82] would apply here.[83] A plaintiff establishes the direct-effect exception when the plaintiff's claim concerns commercial activity that is carried out outside of the United States but causes a direct effect inside the

74. *Id.*
75. *Id.*
76. *Id.*
77. Uyghur Forced Labor Prevention Act, H.R. 6210, 116th Cong. § 3(5) (2020).
78. *Id.* § 11.
79. *Id.* § 4(a).
80. *See* 28 U.S.C. § 1330.
81. *Id.* § 1604.
82. EIG Energy Fund XIV, L.P. v. Petroleo Brasileiro, S.A., 894 F.3d 339, 345 (D.C. Cir. 2018).
83. *See* 28 U.S.C. § 1605(a)(2).

United States.[84] If a plaintiff can show the direct-effect exception to the FSIA, the plaintiff can sue a foreign state.[85]

A plaintiff triggers the direct-effect exception when they show the following: (1) "the lawsuit is . . . based upon an act of a foreign state outside the territory of the United States"; (2) the act "was taken in connection with a commercial activity" outside the United States; and (3) the act "caused a direct effect in the United States."[86] A direct effect is "one that follows as an immediate consequence of the defendant's . . . activity."[87] While a direct effect is not subject to a substantiality requirement to establish jurisdiction, it nonetheless cannot be "purely trivial."[88]

A Uyghur litigant could bring a claim for forced labor against the Chinese government under the ATS and claim a direct-effect exception to the FSIA. The plaintiff would need to argue that (1) the Chinese government's act of forcing the plaintiff to labor in a factory occurred outside the territory of the United States in Xinjiang; (2) that the act was in connection with commercial activity outside the United States; and (3) that the commercial activity had a direct effect in the United States. The first prong is evident; the tortious conduct occurred in Xinjiang and not in the United States.[89] To prove the second prong, the plaintiff would need to argue that the forced labor was in connection with commercial activity. The Second Circuit defines "commercial activity" as actions "by which a private party engages in trade and traffic or commerce."[90] Under this definition, a foreign government's act is commercial and subject to the exception if it is of the same type of commercial act a private actor would engage in.[91] In this case, the act of forcing labor is a commercial act that private actors can engage in.[92] Private actors force millions of people all over the globe into forced labor.[93] Thus, the Chinese government is not acting

84. *Id.*

85. *See id.*

86. *Petroleo Brasileiro*, 894 F.3d at 345 (quoting Republic of Arg. v. Weltover, Inc., 504 U.S. 607, 611 (1992)) (internal quotations omitted).

87. *Id.* (quoting Weltover, Inc. v. Republic of Arg., 941 F.2d 145, 152 (2d Cir. 1991)).

88. *Id.*

89. *See* XU ET AL., *supra* note 15, at 6.

90. *See* Zhen Song, Comment, *Going for Gold: The Meaning of "Commercial Activity" in the Foreign Sovereign Immunities Act in the Race for Buried Treasure in Sunken Shipwreck*, 62 AM. U. L. REV. 1771, 1783 (2013) (quoting Republic of Arg. v. Weltover, Inc., 504 U.S. 607, 614 (1992)).

91. *See id.*

92. As of 2016, private actors have forced over 16 million people into forced labor. Int'l Lab. Off., Walk Free Found., Int'l Org. for Migration, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage*, at 10 (2017), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_575479.pdf [https://perma.cc/G6GZ-5P3Z].

93. *Id.*

sovereignly when forcing Uyghurs to work in labor camps—it is acting commercially.

For the third prong, a plaintiff who was forced into labor by the Chinese government could likely argue that that commercial act directly affected the United States. As discussed previously, many multinational companies directly use forced labor in Xinjiang for goods sold in the United States.[94] But for those goods' assembly or manufacture at the hands of forced labor, they could not be sold to consumers in the United States. Thus, the goods sold are the direct effect required to satisfy a FSIA exception.

The second major claim preclusion is the doctrine of forum non conveniens. Forum non conveniens precludes international human rights claims in U.S. courts when another forum is more convenient.[95] The doctrine itself is a discretionary device that allows a court to, in rare circumstances, "dismiss a claim even if the court is a permissible venue with proper jurisdiction."[96] The Second Circuit in *Wiwa v. Royal Dutch Petroleum Co.* instructed courts on how to weigh the policy interest of providing a forum for human rights litigation against the reality that the U.S. courts may not be the ideal place to do so—but in effect are the only one.[97]

Courts conduct a two-step analysis to determine whether to dismiss a claim for forum non conveniens.[98] First, the court determines "if an adequate alternative forum exists."[99] If an adequate alternative forum exists, the court balances several factors to determine if those factors weigh strongly in favor of the foreign forum.[100] Generally, plaintiffs are entitled to a strong presumption in favor of their choice of forum.[101] Holding that the court should exercise its jurisdiction to hear the claim, the *Wiwa* court considered the presumption of deference to a plaintiff who is a lawful U.S. resident.[102] While foreign nationals litigating in U.S. courts are entitled to no less favorable treatment, greater ties to the chosen forum decreases the likelihood of a forum non conveniens dismissal.[103]

In its factor analysis, the *Wiwa* court also considered that forum non conveniens dismissal could "frustrate Congress's intent to provide a federal forum" for international human rights abuse cases.[104] The

94. XU ET AL., *supra* note 15, at 5.

95. Jeffrey E. Baldwin, Comment, *International Human Rights Plaintiffs and the Doctrine of Forum Non Conveniens*, 40 CORNELL INT'L L.J. 749, 750 (2007).

96. Wiwa v. Royal Dutch Petrol. Co., 226 F.3d 88, 100 (2d Cir. 2000) (quoting PT United Can Co. v. Crown Cork & Seal Co., 138 F.3d 65, 73 (2d Cir. 1998)).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 101.

103. *Id.* at 102.

104. *Id.* at 105.

court pointed to the TVPA as evidence that Congress intended for U.S. courts to consider international human rights abuse cases, and dismissal for forum non conveniens would make it more difficult to realize that intent.[105]

Finally, the court considered international human rights abuse litigants' difficulty in finding alternative forums.[106] Central to forum non conveniens is the idea that U.S. courts are not the best-placed forum to hear the claim.[107] However, as the court recognized, human rights abuse litigants often face great difficulty in obtaining a hearing for those claims in the country where the alleged abuse occurs.[108] Thus, courts should consider potential difficulties a litigant would face bringing the claim in the country where the abuse occurred in forum non conveniens claims.

While courts in the Second Circuit have subsequently applied a narrow reading of *Wiwa*,[109] limiting its application to cases invoking the TVPA, a Uyghur litigant would likely survive a defendant's attempt at a forum non conveniens dismissal even under a narrow reading of *Wiwa*. Further, even a Uyghur victim bringing a claim under the ATS would allege violations that the court could recognize are cognizable under the ATS or the TVPA. It is difficult to imagine that a court considering a claim from a Uyghur litigant suing under the ATS and alleging forced labor, forced sterilization, or torture would grant a forum non conveniens dismissal because the plaintiff failed to make claims universally recognized as violations of international law. The kinds of claims a potential Uyghur plaintiff would allege are like those alleged by the plaintiffs in *Wiwa*, who sued under the ATS and not the TVPA. However, the easiest way for a Uyghur plaintiff to ensure the case would not face forum non conveniens dismissal would be to sue under both the ATS and the TVPA.

B. *The Torture Victim Protection Act*

The TVPA provides subject matter jurisdiction to federal courts to consider torture claims that occur outside the United States.[110] Unlike the ATS, the TVPA provides two causes of action.[111] The first is against "an individual who, under actual or apparent authority, or color of law, of any foreign nation subjects an individual to torture."[112] The second is against any similar individual who "subjects an

105. *Id.*
106. *Id.* at 106.
107. *Id.* at 101.
108. *Id.* at 106.
109. Baldwin, *supra* note 95, at 769.
110. Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102–256, 106 Stat. 73 (1992) (codified as amended at 28 U.S.C. § 1350 notes).
111. *Id.* § 2(a)
112. *Id.* § 2(a)(1).

individual to extrajudicial killing."[113] Under the TVPA, a Uyghur litigant who was subjected to torture or the legal representative of an individual who was subjected to an extrajudicial killing could bring a cause of action against the responsible Chinese government official.

The TVPA was enacted in 1992 to allow victims of official torture and summary execution a forum to litigate their claims.[114] In passing the TVPA, Congress recognized that despite universal condemnation of the practice, many nations around the world still engaged in torture.[115] Congress hoped the law would provide a forum for victims of torture and extrajudicial killings who are otherwise unable to seek remedies in their own countries.[116] However, because of severe jurisdictional constraints, it is extraordinarily difficult for a plaintiff to win a TVPA claim.[117] To win a claim under the TVPA, a Uyghur plaintiff would have to prove the elements, overcome jurisdictional roadblocks, and overcome other preclusions common to TVPA claims.

1. Proving the Elements

Under the TVPA, a plaintiff must show that the defendant committed acts of torture or extrajudicial killing under "authority, or color of law, of any foreign nation."[118] The TVPA defines "torture" as "any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering . . . , whether physical or mental, is intentionally inflicted on that individual."[119] It defines "extrajudicial killing" as "a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[120] Further, the Act requires a claimant to "exhaust[ ] adequate and available remedies in the place in which the conduct giving rise to the claim occurred."[121] Thus, for a TVPA claim a Uyghur litigant must show the following: (1) a torture or extrajudicial killing (2) occurred under Chinese government authority or color of law as an exercise of that authority or law, and (3) all remedies available in China were exhausted.[122]

To determine whether the defendant's alleged acts were torture, the court will apply the expansive definition in the TVPA. The TVPA defines "torture" as follows:

113. *Id.* § 2(a)(2).
114. Michael J. Stephan, *Persecution Restitution: Removing the Jurisdictional Roadblocks to Torture Victim Protection Act Claims*, 84 BROOK. L. REV. 1355, 1358 (2019).
115. *Id.*
116. *See id.*
117. *Id.* at 1357.
118. Torture Victim Protection Act § 2.
119. *Id.* § 3(b).
120. *Id.* § 3(a).
121. *Id.* § 2(b).
122. *See* Warfaa v. Ali, 33 F. Supp. 3d 653, 665–66 (E.D. Va. 2014).

> (1) [A]ny act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and
>
> (2) mental pain or suffering refers to prolonged mental harm caused by or resulting from—
>
> > (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
> >
> > (B) the administration or application, or threatened administration or application, of mind[-]altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
> >
> > (C) the threat of imminent death; or
> >
> > (D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind[-]altering substances or other procedures calculated to disrupt profoundly the senses or personality.[123]

Despite the exhaustive nature of the statute, courts must consider whether the facts of a particular case meet the statutory definition of torture.[124] The acts in question must "reach a certain level of severity" to ensure the conduct described in the statute is extreme and outrageous enough to be labeled torture.[125] Critical is "the degree of pain and suffering that the alleged torturer intended to, and actually did, inflict on the victim."[126] Further, "[t]he more intense, lasting, or heinous the agony, the more likely it is to be torture."[127] Courts have previously considered "kicks and blows to the face" and genitals and pulled teeth as sufficient to show torture.[128] Other courts have found severe pain and suffering sufficient to rise to the level of torture.[129] In

123. Torture Victim Protection Act § 3(b).
124. Stephan, *supra* note 114, at 1361.
125. Boniface v. Viliena, 338 F. Supp. 3d 50, 68 (D. Mass. 2018).
126. *Id.* (quoting Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 93 (D.C. Cir. 2002)) (internal quotations omitted).
127. *Id.* (quoting *Price*, 294 F.3d at 93).
128. Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1345–46 (N.D. Ga. 2002).
129. *See* Chowdhury v. Worldtel Bangl. Holding, Ltd., 746 F.3d 42, 51–52 (2d Cir. 2014).

Boniface v. Viliena, guards pistol-whipped the plaintiff, beat him, threw him to the floor, threatened him with imminent death while a gun was held to his head, and then shot him.[130] The court held that the combination of the severe beating at the hands of several assailants, death threats, and gunshot wounds that caused severe injury were sufficient to show torture under the TVPA.[131]

Because this Comment addresses a hypothetical plaintiff, there is not a specific Uyghur litigant whose allegations can be analogically compared to previous TVPA cases. However, there are multiple accounts from Uyghur victims inside the Xinjiang concentration camps of individuals who suffered severe attacks at the hands of Chinese government officials. Among them is Merdan Ghappar, a model and dancer from Xinjiang who was taken to a concentration camp in 2019.[132] There, he was forced to wear "a black head sack, handcuffs, leg shackles[,] and an iron chain connecting the cuffs to the shackles."[133] When he tried to remove his hood, officers told him they would beat him to death if he did so again.[134] He observed men beaten so harshly that "the skin on their buttocks split open" and they were unable to sit down.[135] Another individual, Tursunay Ziawudun, spent nine months in a Xinjiang camp.[136] There, she was raped on three occasions by two or three men.[137] Another woman in the camps was forced to strip other women naked, handcuff them, and leave them to be raped.[138] Ziawudun was then forcibly interrogated about her husband as officers knocked her onto the floor and repeatedly kicked her in the abdomen.[139] It is estimated that about one million Uyghurs are being held in similar camps.[140] Thus, there is tragically no shortage of potential claimants with similar experiences. Undoubtedly, the aforementioned Uyghur victims and countless others suffered conduct that rises to the level seen in *Boniface* where victims suffered beatings and threats of death. A Uyghur litigant who suffered similar brutality could show the acts were torture.

Next, a Uyghur litigant would need to show that the torture occurred under the color of law.[141] A person acts under color of law

130. *Boniface*, 338 F. Supp. 3d at 69.
131. *Id.*
132. Sudworth, *supra* note 55.
133. *Id.*
134. *Id.*
135. *Id.*
136. Hill et al., *supra* note 1.
137. *Id.*
138. *Id.*
139. *Id.*
140. Jen Kirby, *Concentration Camps and Forced Labor: China's Repression of the Uighurs, Explained*, VOX, https://www.vox.com/2020/7/28/21333345/Uyghurs-china-internment-camps-forced-labor-xinjiang (Sept. 25, 2020, 4:52 PM) [https://perma.cc/68X8-8HBN].
141. *See* Warfaa v. Ali, 33 F. Supp. 3d 653, 665 (E.D. Va. 2014).

"when he acts together with state officials or with significant state aid."[142] Courts have consistently held that when a military or police official acting in their official capacity commits acts of torture, the acts occurred under color of law.[143]

While the inquiry into whether an individual acted under color of law is fact intensive and case specific, reports from Xinjiang show Chinese government officials are running the concentration camps.[144] Specific accounts allege that Chinese government officials are responsible for the heinous acts.[145] As detailed before, Merdan Ghappar was beaten and threatened with death by Chinese government officials.[146] Tursunay Ziawudun was raped, beaten, and interrogated by several men who were also government officials.[147] In both cases, several individuals, all wearing government uniforms and identified as state officials, committed the acts in question.[148]

Further, the U.S. government has concluded that the Chinese government, "under the direction and control of the Chinese Communist Party . . . , has committed crimes against humanity against the . . . Uyghurs."[149] Those crimes include "the arbitrary imprisonment or other severe deprivation of physical liberty of more than one million civilians, forced sterilization, torture of a large number of those arbitrarily detained, forced labor, and the imposition of draconian restrictions on freedom of religion or belief, freedom of expression, and freedom of movement."[150] A hypothetical plaintiff who suffered torture at the hands of Chinese government officials would likely be able to show that state officials committed the acts and they resulted from Chinese government policy designed to suppress, repress, and erase the Uyghur people,[151] thus satisfying the second element under the TVPA.

As to the third element, the TVPA states that "[a] court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred."[152] Thus, a hypothetical plaintiff would need to show that any remedies available in China

142. Chowdhury v. Worldtel Bangl. Holding, Ltd., 746 F.3d 42, 52–53 (2d. Cir. 2014).

143. *See Warfaa*, 33 F. Supp. 3d at 665–66; *Chowdhury*, 746 F.3d at 53; Kadic v. Karadžić, 70 F.3d 232, 245 (2d Cir. 1995).

144. *See* Hill et al., *supra* note 1; Kirby, *supra* note 140; Sudworth, *supra* note 55.

145. *See* Hill et al., *supra* note 1; Kirby, *supra* note 140; Sudworth, *supra* note 55.

146. Sudworth, *supra* note 55.

147. Hill et al., *supra* note 1.

148. *Id.*; Sudworth, *supra* note 55.

149. Press Release, Pompeo, *supra* note 10.

150. *Id.*

151. *Id.*

152. Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102–256, § 2(b), 106 Stat. 73 (1992) (codified as amended at 28 U.S.C. § 1350 notes).

were exhausted.[153] However, courts do not require exhaustion of remedies where they are "unobtainable, ineffective, inadequate, or obviously futile."[154]

2. Jurisdictional Roadblocks

While the TVPA establishes subject matter jurisdiction to consider claims that occurred outside the United States,[155] a court would still need to establish personal jurisdiction over a defendant for a TVPA claim to be successful.[156] Courts can establish personal jurisdiction over a defendant either through general or specific personal jurisdiction.[157] Though not discussed in this Comment, general personal jurisdiction is almost certainly not available for courts to establish personal jurisdiction over a TVPA defendant.[158] Specific personal jurisdiction is also exceptionally difficult to establish for foreign defendants in TVPA cases. To establish specific personal jurisdiction, a hypothetical defendant would need to have sufficient contacts with the forum state to reasonably anticipate "being haled into court in the forum state"[159] and to show that doing so would not disrupt "traditional notions of fair play and substantial justice."[160] It is difficult to imagine that a Chinese government official responsible for torturing Uyghurs in Xinjiang could reasonably expect to be haled into court in the United States to answer for those actions. Even Rule 4(k)(2) of the Federal Rules of Civil Procedure, which provides for personal jurisdiction over foreign defendants,[161] requires the defendant to have "nationwide and worldwide contacts" so that the defendant would be at home in the United States.[162] The likelihood that an official responsible for the torture of Uyghurs in Xinjiang would have sufficient contacts with the United States to be at home here is slim to none. Thus, it is unlikely a U.S. court could assert personal jurisdiction over a hypothetical Chinese government official defending a claim under the TVPA.

While it is likely that a TVPA claim against a Chinese government official would succeed on the merits, it is unlikely such a claim would survive a motion to dismiss for lack of personal jurisdiction. A court's inability to establish personal jurisdiction over a hypothetical defen-

153. *Id.*

154. Stephan, *supra* note 114, at 1363 (quoting S. Rep. No. 102-249, at 10 (1991)) (internal quotations omitted).

155. Torture Victim Protection Act § 2.

156. Stephan, *supra* note 114, at 1358–59.

157. *Id.* at 1368.

158. For a more in-depth analysis of how personal jurisdiction requirements affect TVPA claims, see *id.* at 1363–70.

159. *Id.* at 1370.

160. *Id.* (quoting 102 AM. JUR. 3D *Proof of Facts* § 3 (2008)) (internal quotations omitted).

161. FED. R. CIV. P. 4(k)(2).

162. Stephan, *supra* note 114, at 1372 (quoting Daimler AG v. Bauman, 571 U.S. 117, 154 (2014) (Sotomayor, J., concurring)) (internal quotations omitted).

dant renders the TVPA unable to deliver on its stated purpose to provide relief to victims of the most heinous of acts. Unless Congress amends the TVPA, it is unlikely the Uyghurs, or any other group that suffered systemic acts of torture and extrajudicial killings, will find it a useful vehicle to seek justice.

3. Other Preclusions to TVPA Claims

Like the ATS, the TVPA is subject to the FSIA.[163] A congressional report completed at the time of the TVPA's passing shows that Congress intended the TVPA to apply only to individuals and not governments or their entities.[164] Thus, the FSIA still applies to TVPA actions and restricts the ability of plaintiffs to sue foreign governments.[165] Potential exceptions to the FSIA are discussed in Section III.A.3.c. However, even if it were impossible to name the Chinese government as a defendant, it still may be possible to sue a foreign government official—though, for aforementioned reasons, that effort would be similarly futile because it is unlikely a court could exercise personal jurisdiction over a hypothetical Chinese government official responsible for torture.[166]

Next, unlike the ATS, the presumption against extraterritoriality does not apply to claims brought under the TVPA. Discussed in Section III.A.3.b, the presumption against extraterritoriality is a "territorial constraint[ ] on common-law causes of action under the ATS."[167] The presumption against extraterritoriality does not automatically apply to statutory causes of action like the TVPA.[168] Instead, the court will analyze the statute to determine whether it gives a "clear indication of an extraterritorial application."[169] The TVPA creates a cause of action for torture or extrajudicial killings committed by an individual of "any foreign nation."[170] Thus, the statute primarily addresses conduct "occurring in the territory of foreign sovereigns."[171] As such, Congress clearly intended the TVPA to have an extraterritorial application and not be subject to the presumption against extraterritoriality.[172]

Finally, while the doctrine of forum non conveniens could be used to dismiss a TVPA claim brought by a Uyghur litigant, it is less likely

163. *Id.* at 1359.
164. *Id.*
165. *Id.*
166. *See id.* at 1380.
167. Chowdhury v. Worldtel Bangl. Holding, Ltd., 746 F.3d 42, 50–51 (2d Cir. 2014).
168. *Id.*
169. *Id.* (quoting Kiobel v. Royal Dutch Petrol. Co., 569 U.S. 108, 115 (2013)).
170. *Id.* at 51 (quoting Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified as amended at 28 U.S.C. § 1350 notes)).
171. *Id.*
172. *See id.*

to do so than a claim brought under the ATS. The doctrine of forum non conveniens is addressed in Section III.A.3.c of this Comment. It allows a defendant to dismiss a suit when they can show "an adequate alternate forum is available" and convenience strongly favors dismissal.[173] As previously discussed, it is unlikely a Chinese government official defendant would be able to show a Uyghur litigant has an adequate alternate forum.[174] The *Wiwa* court held that for claims brought under the TVPA, there is a strong presumption *against* application of forum non conveniens.[175] The TVPA was passed to offer victims of torture and extrajudicial killings a forum to seek justice for the atrocities they suffered.[176] To deny that forum is inconsistent with the purpose of the TVPA.[177]

IV. Conclusion

Neither the ATS nor the TVPA is likely to allow Uyghur litigants to recover against the Chinese government or government officials for the atrocities committed in Xinjiang. Uyghurs and other international human rights abuse victims seeking to redress claims in U.S. courts face an uphill battle given (1) high procedural hurdles like personal jurisdiction and (2) substantive doctrinal issues like the presumption against extraterritoriality or forum non conveniens. The Supreme Court's recent jurisprudence shows the Court's increasing willingness to restrict a foreign litigant's use of federal courts to litigate human rights claims, and it dampens the likelihood that current circuit splits will resolve in favor of foreign litigants. Thus, any change in the status quo likely requires an act of Congress.

Congressional action might be most appropriate given the significant foreign policy and political considerations inherent to claims against foreign governments and their actors. Legislation that provides causes of action to specific international human rights abuse victims would be a sensible solution affording those victims a forum to litigate their claims while also ensuring those opportunities align with U.S. policy interests. In the case of the Uyghurs, Congress has recognized a U.S. interest in the Xinjiang crisis through passage of the Uyghur Human Rights Policy Act of 2020. The United States has also recognized that the Chinese government is committing a genocide against the Uyghurs in Xinjiang.[178] Given the broad political consensus that the Chinese government's actions in Xinjiang are atrocious, there may be the requisite political will to pass legislation authorizing

173. Helen E. Mardirosian, Comment, *VII. Forum Non Conveniens*, 37 Loy. L.A. L. Rev. 1643, 1643 (2004).
174. *See supra* Section III.A.3.c.
175. Wiwa v. Royal Dutch Petrol. Co., 226 F.3d 88, 100–01 (2d Cir. 2000).
176. *See id.* at 100, 104–05.
177. *See id.*
178. Press Release, Pompeo, *supra* note 10.

the Uyghurs to sue those responsible in U.S. courts. Congress should pass such legislation, and the President should sign it. Uyghur litigants should be afforded a forum to seek justice for the heinous atrocities committed in Xinjiang. The United States can and should provide that forum.